STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and the Circuit Court for the County of Macomb)

JENNIFER L. HUDOCK and
BRIAN D. HUDOCK,

Plaintiffs-Appellees,

-vs-

EDWARD SCHULAK, HOBBS & BLACK, INC., Architects and Consultants,

Defendant-Appellant.
_____/

Supreme Court No: 126859
C.A. No: 245934
L.C. No: 00-1912 CE

AMICUS CURIAE BRIEF ON BEHALF OF GMB ARCHITECTS-ENGINEERS, INC.

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STATEMENT OF ORDER APPEALED FROM

The Amicus Curiae represented in this Brief incorporates by reference the Statement of Order Appealed From contained in Defendant-Appellant Edward, Schulak, Hobbs & Black, Inc.'s application for Leave to Appeal from the July 8, 2004 decision of the Michigan Court of Appeals rendered in *Ostroth v Warren Regency*, GP, LLC, 263 Mich App 1; 687 NW2d 309 (2004).

STATEMENT OF ISSUES

DOES THE SIX YEAR STATUTE OF REPOSE SET FORTH IN MCL 600.5839 OPERATE TO THE EXCLUSION OF THE TWO YEAR STATUTE OF LIMITATIONS APPLICABLE TO MALPRACTICE ACTIONS AGAINST ENGINEERS AND ARCHITECTS AND OF THE CORRESPONDING THREE YEAR LIMITATIONS PERIOD APPLICABLE TO NEGLIGENCE ACTIONS AGAINST CONSTRUCTION CONTRACTORS?

Defendant-Appellant says "No."

Amicus Curiae says "No."

Plaintiff-Appellee says "Yes."

The trial court said "No."

The Michigan Court of Appeals said "Yes" while creating a split of authority on the issue.

STATEMENT OF INTEREST OF AMICUS CURIAE

In Support of its MOTION FOR LEAVE TO FILE BRIEF AND PARTICIPATE AS AMICUS CURIAE, Prospective Amicus Curiae, GMB ARCHITECTS AND ENGINEERS, INC. relies upon the reasons stated in its Motion, upon MCR 7.306(D), and upon the following:

GMB is a Similarly Situated Architect

GMB is an architect similarly situated to Appellant Edward Schulak, Hobbs & Black, Inc. ("ESHB"), and supports ESHB's Request for Relief. The facts in the instant case are similar to the facts in the case of *GMB v. Ecorse Board of Education,* Wayne County Court Case No. 05-514093-CK, Court of Appeals Docket No. 265135;

Amicus Ecorse Board of Education is a Party in *GMB v. EBE*

GMB's opponent in the above-referenced case, the Ecorse Board of Education ("EBE"), has recently been granted leave to file an Amicus brief in the instant case. EBE's brief is particularly misleading and GMB requests leave to respond to the arguments contained therein.

EBE's "Actual" Interest Has Gone Undisclosed

EBE's interest in the *Ostroth* case arises from the fact it is a party to pending litigation, not as a "concerned school district." In truth, EBE contracted with GMB to provide architectural services on four projects for the EBE. The contract between the parties contained an arbitration clause. However, the contract also contained paragraph 12.13.2, a specially written clause, authored by the EBE, which prescribed

that the enforceability of the parties' arbitration clause was subject to the Michigan statute of limitations. Paragraph 12.13.2 states in pertinent part:

> "Demand shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter has arisen. *In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute, or other matter in question would be barred by the applicable statute of limitations*." [emphasis added]

By its terms therefore, the contract incorporated the Michigan statute of limitations and unambiguously states the effect of the arbitration clause would expire at the same time the institution of a legal or equitable proceeding would become barred by the applicable statute of limitations.

After GMB completed its contractual performance, EBE failed to pay in full. In order to deter GMB from its collection efforts, EBE filed a demand for arbitration, claiming that GMB committed architectural malpractice. However, EBE filed its demand approximately five (5) years after it was aware of the factual basis of its claim, and well after two (2) years from the date GMB last provided professional services for the projects.

As a result, GMB filed suit in Circuit Court and requested a declaratory judgment, requesting an order declaring that pursuant to the contract, GMB was no longer subject to EBE's arbitration demand. The trial court, citing the unpublished case of *Studio B Architects, Inc. v Metaldyne,* Unpublished, Michigan Court of Appeals docket No. 248017 (October 12, 2004), held that whether the statute of limitations barred EBE's arbitration demand was a question of "arbitrability" that must be decided

by the arbitrator, not the Court. GMB filed a timely claim of appeal because the clear written intention of the parties was to apply the statute of limitations to prevent untimely arbitrations, not to merely create a question that would have to be arbitrated anyway. GMB's appeal is now pending in the Court of Appeals as Docket No. 265135.[1]

Relationship to *Ostroth* Appeal

Central to GMB's appeal, of course, is its reliance on *Witherspoon v Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994)* for the proposition that the applicable statute of limitations for architectural malpractice is two years from the date of last professional service pursuant to MCL 600.5805 (6) and MCL 600.5838. *Ostroth v. Warren* Regency, 263 *Mich. App. 1; 687 NW2d 309 (2004)* directly (and incorrectly) contradicts *Witherspoon*, holding that the applicable statute of limitations for architectural malpractice is six years from date of first use, occupancy or acceptance of the improvement; pursuant to MCL 600.5839.

Obviously, the law regarding the statute of limitations *and* the law regarding contractual arbitration clauses that *incorporate* the Michigan statute of limitations is currently confused and contradictory. The statute of limitations question is now before this Court. It is absolutely clear that EBE's motivation in filing its Amicus brief is self-interest, and its brief is *not* submitted on behalf of the School Districts of Michigan.

[1] The question of whether the Court or an Arbitrator should apply the statute of limitations when it is directly incorporated into an arbitration clause is currently subject to conflicting law in Michigan. See for example, *Smith Barney* v *Sarver*, 108 F3d 98, (1997); and *Amtower v William C. Roney & Co, 232 Mich App 226 (1998).* The "arbitrability" of the statute of limitations when incorporated as a contractual limitation on arbitration agreements is closely related to *Ostroth* and *Witherspoon*, and GMB respectfully suggests the arbitrability issue is also ripe for badly-needed clarification in Michigan.

Based on the foregoing, GMB is sufficiently interested in the outcome of the instant case as a similarly situated architect, and respectfully requests the Court grant its motion to file an Amicus Brief.

STATEMENT OF FACTS

Amicus Curiae, GMB incorporates by reference the Statement of Facts contained in Defendant-Appellant's Application for Leave to Appeal.

ARGUMENT

DOES THE SIX YEAR STATUTE OF REPOSE SET FORTH IN MCL 600.5839 OPERATE TO THE EXCLUSION OF THE TWO YEAR STATUTE OF LIMITATIONS APPLICABLE TO MALPRACTICE ACTIONS AGAINST ENGINEERS AND ARCHITECTS AND OF THE CORRESPONDING THREE YEAR LIMITATIONS PERIOD APPLICABLE TO NEGLIGENCE ACTIONS AGAINST CONSTRUCTION CONTRACTORS?

STANDARD OF REVIEW

This case involves questions of statutory interpretation as well as the review of the grant of summary disposition by the trial court; this Court must therefore review these issues *de novo*. Roberts v Mecosta, 466 Mich 57, 62; 642 NW2d 663 (2002), Omelenchuk v City of Warren, 466 Mich 524, 527; 646 NW2d 493 (2002).

RESPONSES to EBE's ARGUMENTS

EBE Does Not Represent School Districts

EBE presents itself as representing the interests of school districts. It should be clear to the Court that EBE is personally involved in its own legal dispute on this issue and is promoting its own specific, pecuniary interests and *not* the broad interest of school districts. EBE only seeks to avoid paying GMB's architectural services fees, and has therefore filed its belated malpractice claim in hopes of deterring GMB from collecting the amounts due. By filing its Amicus Brief, EBE is solely looking to ensure that its claim will survive GMB's appeal. If any other Michigan school boards were in support of Ostroth, the professional associations for the school districts could and would speak. They have not done so.

EBE's "Two Years is Not Enough" Argument

EBE makes the argument that defects in construction do not always become known within two years of substantial completion, and that, "under *Witherspoon*, the entire six-year repose period would never be available to an injured party." (EBE Brief at pages 1-2) Based on the foregoing, EBE makes a *policy* argument that the statute of limitations should be six years.

First, public policy is made by the Legislature. EBE is essentially asking the Court to ignore the policy set by the Legislature and impose the policy that EBE itself subjectively desires.

Second, EBE has misstated the effect of *Witherspoon*. It is of course true that construction defects are not always discovered within two years of use, occupancy or acceptance. However, under *Witherspoon* an injured party *does* enjoy the right to file suit during the entire six-year repose period. The right of a plaintiff to bring a claim is also subject, however, to the applicable statute found in MCL 600.5805. The foregoing is more fully explored in the next section immediately below.

EBE's Mis-Statement of the Limitations/Repose Issue

EBE also argues that *Witherspoon* proponents "continue to refer to MCL 600.5839 as a 'period of repose' only." (EBE's brief at page 3) Nothing is further from the truth. EBE's and the *Ostroth* Appellee's critical failure to comprehend this issue is central to this case. For the Legislative policy to be enforced by the statutes as written, MCL 600.5839 must be interpreted as *both* a statute of limitations and a statute of repose. The Legislative policy is clear that claims are no longer cognizable

six years after use, occupancy, or acceptance. After six years pass, claims *do not accrue*, pursuant to MCL 600.5839. However, unless MCL 600.5839 also operates to limit claims that have accrued *before* the end of the six (6) year period, the Legislative policy of setting a clear "end date" for claims would be frustrated.

To appreciate the fallacy of EBE's arguments, it is important to understand why the Legislature has created both a statute of limitations and a statute of repose, and why both functions are *necessary* to fulfill the Legislature's policy. Two illustrative examples are provided herein:

Illustrative Example using a claim of Malpractice against an Architect:

Pursuant to MCL 600.5805 (6) and MCL 600.5839, a malpractice claim accrues at the date of the architect's last professional service, even if the plaintiff knew of the claim earlier than that. The period of limitations is two (2) years from accrual. Say, however, a design defect is discovered four (4) years after the date of last professional service. A claim arising from that defect is not barred, as asserted by EBE. Pursuant to MCL 600.5838, the plaintiff is afforded six months to file suit, from the date it discovered or should have discovered the defect. The foregoing will be true until six years from the use, occupancy, or acceptance of the improvement has passed.

Pursuant to MCL 600.5839, at six (6) years from use occupancy or acceptance, a plaintiff's claim that has accrued by virtue of the discovery of a defect are nonetheless barred at that point and may not be pursued. The foregoing illustrates how MCL 600.5839 functions as a statute of limitations.

Defects that are discovered after the passage of six (6) years from the date of first use, occupancy or acceptance of the improvement do not give rise to claims.

After that point, MCL 600.5839 prevents a cause of action from ever accruing.[2] See, O'Brien v. Hazelet & Erdal, *410 Mich. 1, 15; 299 N.W.2d 336 (1980)*. The foregoing illustrates how MCL 600.5839 functions as a statute of repose.

Accordingly, for claims of architectural malpractice discovered after two years, pursuant to MCL 600.5838, a plaintiff enjoys the right to bring a claim for the duration of the six (6) year repose period, and that right continues at least from the date of first use, occupancy or acceptance until six years has passed, at which time the claims can no longer accrue, in accordance with MCL 600.5839.[3] However, the Legislature has also made clear that a plaintiff that has discovered its cause of action may not sit on its hands, but must instead bring its claim within the time limits prescribed by MCL 600.5805 (6) and MCL 600.5838. Therefore, a plaintiff that discovers its cause of action after two years, pursuant to MCL 600.5805(6) and 600.5838, must file its cause of action within six months from the date of discovery.

The Legislature's policy is completely rational and sensible.[4]

Illustrative Example using a claim of negligence against a Contractor:

To further clarify the operation of the statutory scheme, take the case of *Witherspoon* itself and alter the facts slightly. Assume in *Witherspoon* that the plaintiff's accident occurred five years after use, occupancy or acceptance of the guardrail. The statute of limitations for negligence actions against contractors

[2] For purposes of these examples, we will assume mere negligence, and not "gross negligence."

[3] Amicus EBE cannot itself take advantage of the "discovery" aspect of MCL 600.5838 because it knew the facts upon which it bases its claim long before GMB's last professional service. The foregoing is part of the motivation behind EBE's efforts to promote *Ostroth* as the law.

[4] Further explanations of the Legislature's policy and the historical development of that policy are amply provided in other Amicus briefs.

pursuant to MCL 600.5805 is three years from the date of accrual. In this situation, the plaintiff is not afforded a full three years from the date of discovery of the claim to file its lawsuit. Although the claim has unquestionably accrued, MCL 600.5839 functions as a statute of limitations barring the claim if it is not filed within six years from the date of use, occupancy or acceptance of the improvement. Because MCL.600.5839 is a statute of limitations, in our example the plaintiff would only enjoy a period of one (1) year to file its lawsuit. If MCL 600.5839 *only* acted as a statute of repose to prevent claims from accruing, and not as a statute of limitations to bar claims that have already accrued, then the plaintiff in this example would have until eight years after use occupancy or acceptance to file its claim. Clearly that was not the intent of the Legislature. MCL 600.5839 *must* have both limitations and repose functions.

Alter the facts of *Witherspoon* once more. Assume the plaintiff's accident occurred seven (7) years after use, occupancy or acceptance of the guardrail. Because MCL 600.5839 also functions and operates as a statute of repose, no claim accrues because the accident occurred after the six (6) year period from the date of first use, occupancy or acceptance. In this circumstance, MCL 600.5839 operates as a statute of repose. See, *O'Brien v. Hazelet & Erdal, 410 Mich. 1, 15; 299 N.W.2d 336 (1980)*.

Clearly, the *Witherspoon* Court understood the Legislative intent to require plaintiffs to bring their claims within a reasonable time after accrual, and understood the Legislative intent to bar *all* claims once the six-year time period expires. As confirmed by *Witherspoon*, the application of 600.5805 vindicates the former aspect of

the policy, and the dual operation of MCL 600.5839 as both a statute of limitations and repose vindicates the latter aspect of the policy. [5]

Witherspoon* Does Not Contradict *O'Brien* and *Michigan Millers

EBE argues that *Witherspoon* contradicts *O'Brien v. Hazelet & Erdal, 410 Mich. 1; 299 N.W.2d 336 (1980)*; and *Michigan Millers v. West Detroit Building Company,196 Mich. App. 367; 494 N.W.2d 1 (1992)*. (EBE's Brief at page 3) In the instant action, other Amicii have previously filed briefs fully explaining the reasons why *Witherspoon*, *O'Brien* and *Michigan Miller's* are all completely consistent, and GMB supports and adopts those arguments.

MCL 600.5839 Does Not "Standardize" All Limitations Periods, as EBE Asserts

EBE argues that the Legislature intended to create "a standard period of limitations for Architects, Engineers and Contractors, based on the completion of a project and NOT the discovery of a defect." (EBE's brief at page 4) No other party or Amicus has made the foregoing argument in support of *Ostroth*, and there is no authority or information of any kind to support it. However, the argument is helpful because it serves to highlight the fatal defects in the *Ostroth* Courts' reasoning.

Specifically, if the Legislature intended that all causes of action arising from improvements to real property accrue ONLY at project completion and all claims have

[5] It is instructive that the opponents of *Witherspoon* are continually perplexed that the *Witherspoon* Court recognized that MCL 600.5839 was both a statute of limitations and repose but still looked to MCL 600.5805 for the applicable limitations period. Obviously, in order for the statutory scheme to operate fully, the *Witherspoon* interpretation *must* be employed. An inability to understand this key concept on the part of EBE and other *Witherspoon* opponents is apparent. It is, therefore, not surprising EBE finds the statutory scheme to be "odd." (EBE's brief at page 8)

a six-year statute of limitations, what then does an injured party do if the project is *never* used, occupied or accepted?[6] Does the injured party's claim actually accrue? If it does accrue, when does the limitations/repose period end? If there is no use, occupancy or acceptance, when does the "standard" limitations period begin and end? Patently, the Legislature assumed that the existing statutes of limitations would continue to be applicable, and that MCL 600.5839 was supplementary. There is no other logical interpretation of the statutes.[7]

EBE Misrepresents the Purpose of the Enactment of MCL 600.5805 (10)

EBE further misrepresents the issues presented to the Legislature in 1988. (EBE's brief at pages 5-7) In the cases of *Marysville v. Pate, Hirn & Bogue, 154 Mich. App. 655; 397 NW2d 859 (1986), Burrows v. Bidigare/Bublys158 Mich. App. 175; 404 N.W.2d 650 (1987)* and *Midland v. Helger, 157 Mich. App.736; 403 N.W.2d 218 (1987)*, the Defendants sought the protections of the statute for its repose effect, and the limitations effect was *never* at issue. The Legislature's enactment of MCL 600.5805 (10) (now (14)), being a reaction to these cases, was intended only to include owner claims within the application of the repose period. The foregoing issue was the *only* issue in play at the time. It was not until *Witherspoon* that the Court addressed the interplay between MCL 600.5805 and MCL 600.5839. Much to its

[6] Failure to use, occupy or complete a construction project is not an uncommon circumstance. In fact, errors or negligence may be the cause in fact of the failure to complete, and become the very basis for a claim.

[7] Another key concept that appears to escape the critics of *Witherspoon* is that more than one statute of limitations is applicable in these cases. The proper question is not *which one* of the statutory sections apply, but rather, *how* does the statutory scheme *as a whole* apply?

credit, in addressing the relationship of the two statutes, the *Witherspoon* Court also explained the operation of the full statutory scheme.

The Complete *Burrows* Dissenting Opinion was Not Adopted

EBE also disingenuously argues that Judge Burn's dissent in *Burrows* was fully adopted by the Legislature when enacting MCL 600.5805 (10) (now (14)). (EBE's Brief at page 7) As made abundantly clear in materials submitted to the Court by other parties and Amicii in this appeal, Judge Burn's dissent contained a number of opinions. Only *one* of these opinions was adopted by the Legislature. The only issue discussed in connection with the enactment of MCL 600.5805(10) (now (14)), was Judge Burns' view that both owner claims and third party claims were subject to the statutory repose period. While Judge Burns did address additional questions in his dissent, his other opinions went beyond the majority holding. There is no indication anywhere, and no logical reason to assume, that the Legislature ever considered Burn's additional opinions, much less adopted them in full, as suggested by EBE. GMB supports those parties that have clarified the issue and set the record straight.[8]

***Traver Lakes* was Wrongly Decided, has no Force of Law and Should be Expressly Overruled**

EBE cites *Traver Lakes v. Douglas, 224 Mich. App. 335; 568 N.W.2d 847 (1997)* in support of its arguments. (EBE's Brief at page 7) *Traver Lakes* was decided three years after *Witherspoon* in violation of the rules of stare decisis. *Traver Lakes*

[8] Likewise, EBE has misrepresented the testimony of Mr. Dennis Cawthorne in connection with the Legislative hearings for MCL 600.5805(10) (now (14)). If the materials submitted to the Court are reviewed, there can be no doubt that Mr. Cawthorne was discussing only the specific issue of the day: Whether the protections of the repose period should apply to owner-based claims as well as third-party claims. The full transcripts from the hearing speak for themselves.

does not cite *Witherspoon*, lacks any analysis of the relevant issue, and accordingly should be expressly overruled by this Court.

Michigan Millers Held the Statutory Language was NOT Clear

Curiously, EBE argues that *Witherspoon* is an "aberration" which "ignores the plain meaning of the statutory language", and that unambiguous statutory language must be "enforced as written." (EBE's brief at pages 2, and 8) EBE also repeatedly refers to the statutory language of MCL 600.5805 (10) (now (14)) as "plain". (EBE's brief at pages 4 and 5) This argument may be the most disingenuous of all, because *Michigan Millers*, the very case upon which EBE relies, held that:

> "...the language of the statute in question is not clear and unambiguous, because reasonable minds could differ concerning whether § 5805(10) [now 5805(14)] clearly specifies the applicable limitation period." *Michigan Millers v. West Detroit Building Company 196 Mich. App. 367 at 374; 494 N.W.2d 1 (1992).*

Because the statutory language is ambiguous and not clear, the *Witherspoon* Court was not only entitled, but *required* to interpret the statutory scheme as it did, in a manner that gives full effect to all the statutory sections.

The Martinovich Article is Irrelevant

Finally, EBE argues that the Court should give weight to a 1992 article authored by attorney Cynthia M. Martinovich, in which she allegedly concludes the limitations period is six years. (EBE's brief at pages 10-11) First, it is beyond dispute that Ms. Martinovich's article represents her personal opinion, and not legal authority. Second, the full text of the article reveals that Ms. Martinovich's article highlights the *confusion* that existed in the law at the time, *not* the "clarity." Third, Ms. Martinovich's article

appeared before *Witherspoon* was decided, so any value its reasoning might once have had has been superceded long ago, much like EBE's arguments.

CONCLUSION

For the foregoing reasons, Amicus Curiae GMB Architects-Engineers, Inc. respectfully request that this Honorable Court vacate the July 8, 2004 written opinion of the Michigan Court of Appeals and reinstate the trial court's summary disposition order.

Respectfully submitted,

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